

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1216

To be argued by

LAWRENCE H. LEVNER, ESQ.

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 75-1216

UNITED STATES OF AMERICA,

Appellee,

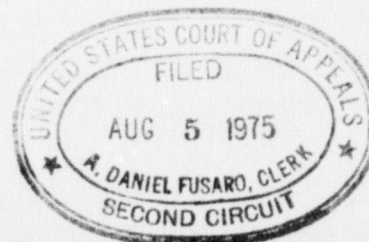
- v -

ANTONIO REYES, et al.,

Appellant.

Anders BRIEF FOR APPELLANT ANTONIO REYES

LAWRENCE H. LEVNER,
Attorney for the Appellant,
ANTONIO REYES,
521 Fifth Avenue
New York, N. Y. 10017
(212) 687-4640



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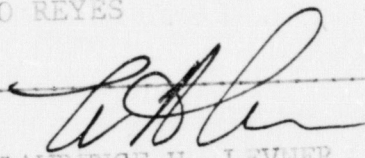

LAWRENCE H. LEVNER,
Attorney for the Appellant,
ANTONIO REYES,
521 Fifth Avenue
New York, N. Y. 10017
(212) 687-4640

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1216

UNITED STATES OF AMERICA,

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- v -

ANTONIO REYES, et al.,

Appellant.

BRIEF OF APPELLANT, ANTONIO REYES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Sentence Imposed Upon The Appellant Violated His
Constitutional Right To Be Free From Cruel And Unusual
Punishment.

STATEMENT OF FACTS

1. INTRODUCTION

This is an appeal from the final judgment of the United States District Court for the Southern District of New York (Brieant, J.), entered on June 6, 1975 after a jury trial convicting the defendant-appellant, Antonio Reyes, (hereinafter "appellant") and another of conspiring to violate the narcotics law (Count 1) and of the substantive offenses of possessing with intent to distribute narcotic drugs (Counts 2 & 3), all in violation of the laws of the United States.

The appellant was sentenced to a term of imprisonment of 12 years to be followed by three years special parole (R. 411).* The appellant is now incarcerated.

2. THE INDICTMENT

The indictment against the appellant and one Brunilda Rodriguez pursuant to which they were tried, consisted of three counts. The first count alleged a conspiracy to violate sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21 U.S.C. The second and third counts alleged substantive violations of sections 812, 18 U.S.C. 841(a)(1) and 841(b)(1)(A) of Title 21 U.S.C. and section 2 of Title 18 U.S.C.

* References to the trial transcript on file in this Court bear the prefix "R".

3. THE GOVERNMENT'S CASE

As the appellant's assigned trial counsel and having conscientiously examined the trial record, no attempt will be made herein to persuade this Court that the judgment of conviction of the appellant should be reversed because of error at trial or because of insufficiency of the evidence. In my judgment, nothing appears in the record that might arguably support a good faith contention that the verdict of conviction was erroneous as a matter of fact or law (c.f. Anders v. State of California, 386 U.S. 743 (1967)).

As will be shown more fully below, the instant appeal is, however, predicated upon the unduly harsh sentence imposed upon the appellant by the trial judge.*

ARGUMENT

THE SENTENCE IMPOSED UPON THE APPELLANT
VIOLATED HIS CONSTITUTIONAL RIGHT TO BE
FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

At trial, the Government's main witness, Angel Rodriguez, an Agent of the Drug Enforcement Administration working undercover, testified that as a result of a conversation he had in 1973 with one Louis Lopez, a prisoner

* Pursuant to Anders, I have advised appellant of the fact that in my estimation, the only meritorious point to be raised before this Court is the excessiveness of the sentence and have furnished him with a copy of the brief herein.

at the West Street House of Detention, he called and later met with the appellant (R. 39). Thereafter, the appellant introduced him to various individuals from or through whom he was able to purchase various amounts of heroin. The record reflects that at no time did the Government ever contend or establish that the defendant possessed or sold heroin. Rather, the record is clear that the appellant's culpability consisted of introducing the Agent to individuals from or through whom he ultimately purchased heroin. From those introductions the appellant, a former drug addict who, since 1970, was in a methadone program, derived the grand total of \$150.00 (R. 189, 408). In fact, the testimony of Agent Rodriguez indicates that the appellant did not even know one Hector Soto who, together with his brother Victor, became the Agent's supplier of heroin after he was introduced to them by the co-defendant Brunilda Rodriguez (R. 73).

Indeed, at the sentencing, the trial judge even stated:

"... I don't find you to be a significant drug dealer in your own right. You certainly were not the main target of this particular investigation ..." (R. 411)

Despite these apt observations, the trial judge, nevertheless, sentenced the appellant to a term of imprisonment which befits a major dealer in narcotics.* While we are not unmindful that the sentence imposed is not invalid as a matter of law, we respectfully urge that it was so grossly disproportionate to the offense committed and the appellant's circumstances, and so arbitrarily imposed as to constitute a violation of appellant's constitutional right to be free from cruel and unusual punishments. Certainly, the excessive length and severity of the sentence served no penal purpose more effectively than a significantly less drastic punishment.** Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910); United States Constitution, 8th Amendment., *Downey v Perini*, 17 CAL 1325 (6th Cir, July 75)

* Indeed, in even the major, major narcotics cases in this Circuit, with the exception of the truly major operatives, sentences of 12 years have been rarely imposed. See for example, United States v. Sperling, 506 F. 2d 1323 (2nd Cir., 1974); United States v. Tramunti, 513 F. 2d 1087 (2nd Cir., 1975).

** The appellant is married and the father of two young children. At the time of his arrest, he was living with and attempting to support his family (R. 408). Although he had been convicted of misdemeanors and petty offenses years ago, he had never been convicted of a felony or federal crime. His criminal record, as furnished by the Government, is annexed hereto.

The disparity of sentences as imposed both within this Circuit and throughout the United States is a problem well known to this Court. (See for example "Court Study Underscores Disparity in Sentencing", N. Y. Law Journal, September 9, 1974.) Indeed, the disparity in imposing radically different sentences on defendants charged with the same or similar offenses is readily acknowledged to be one of the major flaws within our criminal justice system. Frankel, Criminal Sentences, Law Without Order, Hill and Wang, 1973.

In 1972, the United States Attorney's Office for the Southern District of New York made a study of sentences imposed in that District. That study, published in April, 1973 (New York State Bar Journal, April 1973, Vol. 45, #3), covered the sentencing of 645 individual defendants and is acknowledged to be statistically sound.

Insofar as narcotics offenses were concerned, the study indicated that the average length of prison sentences imposed within the Southern District of New York was 62.4 months. In the instant case, the appellant received 144 months. The disparity between the sentence imposed on the appellant becomes even more pronounced when juxtaposed with the average length of sentences imposed in narcotics cases

by the Federal District Courts nationwide, to wit; 46.4 months (see 1972 Annual Report of Director For the Administrative Office of the United States Courts).

The fact that appellant's sentence was shockingly excessive when compared to others similarly situated is bolstered by the recent study on sentencing disparity made in this Circuit. Entitled, "The Second Circuit Sentencing Study", A Report To The Judges Of The Second Circuit", this study was undertaken by a 16 member committee under the auspices of the Chief Judge of this Court.

As this Court is doubtless aware, the study involved 20 hypothetical cases involving a variety of offenses. In each case, a pre-sentence report was prepared and furnished to each District Judge sitting in this Circuit. The District Judges were then asked to impose what they believed to be an appropriate sentence in each of the cases. Although the study established empirically and dramatically the sentencing disparity within the Circuit, one facet of the study is particularly instructive in the instant situation. Hypothetical Case #3 in the study, (p. 46), involved the sale of heroin under Title 21 U.S.C. Of the 46 Judges responding, the most severe sentence imposed was 10 years imprisonment followed by 5 years special parole. The least severe sentence imposed was 1 year imprisonment to be followed by 5 years special parole.

Notwithstanding the fact that the hypothetical defendant had seven convictions, three other arrests and five periods of incarceration, 37 of the 46 Judges responding imposed a prison term of 5 years or less and not a single one imposed a prison term in excess of 10 years. A comparison of this hypothetical case with the one at bar indicates the draconian tenor of the sentence arbitrarily imposed by the trial Court. Indeed, in this very case the disparity of the sentences imposed upon the other defendants -- the sellers of the drugs -- and the appellant is shocking and cries out for appellate review in the interest of justice.* American Bar Association Standards Relating To Appellate Review of Sentences, April, 1967; United States v. Schwartz, 500 F. 2d 1350 (2nd Cir., 1974); United States v. Rosner, 485 F. 2d 1213 (2nd Cir., 1973); United States v. Slutsky, ___ F. 2d ___, April 1975.

* Sentences:

Brunilda Rodriguez	18 months
Ricardo Quiles	6 years (sale)
Hector Soto	4 years (sale)
Santiago Medina	3 years (sale)
Victor Soto	(fugitive)
Joseph Cacciola	(to be sentenced 7/29/75)

Recently in Dorszynski v. United States, 418 U.S. 424 (1974),
the Supreme Court noted:

"although well - established doctrine bars
review of the exercise of sentencing
discretion, limited review is available
when sentencing discretion is not exercised
at all."

Here , we submit, sentencing discretion was not exercised at
all with reference to the appellant.

PURSUANT TO RULE 23 of the FEDERAL RULES OF
APPELLATE PROCEEDURE THE APPELLANT HEREBY
ADOPTS EACH OF THE CO-APPELLANTS POINTS IN
SO FAR AS APPLICABLE TO HIMSELF.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE
SENTENCE OF THE TRIAL COURT SHOULD
BE VACATED AND THE APPELLANT SHOULD BE
RESENTENCED.

Respectfully submitted,

Lawrence H. Levner
Attorney for
Defendant - Appellant

1-22
IDENTIFICATION DIVISION

The following FBI record, NUMBER 475 052 E

, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
PD NY NY	Jose Torres #519805	7-24-62	3305 PHL 1747 D PL	
PD NY NY	Antonio Reyes #B519805	4-6-63	722-6 PL jostling	
WH Hart Isl NY NY	Antonio Reyes #163 5535	4-23-63	722-6 jostling	6 mos
PD NY NY	Anthony Reyes #B519805	1-18-64	722 PL sub 6 jostling	
WH Hart Isl NY NY	Antonio Reyes #02571	2-17-64	722-3 Congregating on street	3 mos
PD NY NY	Antonio Reyes #519805	8-23-65	GL (from auto)	
PD NY NY	Antonio Rios Reyes #B519805	3-11-66	fugitive - Puerto Rico	
Crim Crt City of NY NY NY	Antonio Reyes #627516 1240 x 66	3-16-66	PL	90 das WH SS
PD NY NY	Epifiano Estrada #519805	12-5-66	burg	
Crim Crts City of NY NY NY	Epifiano Ortiz #8690 X 2C-66	12-7-66	burg to 405	4 mos
WH Hart Isl NY NY	Epifino Ortiz #366. 8076	12-8-66	house 405	4 mos

Information shown on this Identification Record represents data furnished FBI by fingerprint contributors. Where final disposition is not shown or further explanation of charge is desired, communicate with agency contributing those fingerprints.

Notations indicated by * are NOT based on fingerprints in FBI files but are listed only as investigative leads as being possibly identical with subject of this record.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20537

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CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
PD NY NY	Antonio Reyes. #519805	8-10-67	GL	
NYC Receipt Class Center East Elmhurst NY	Antonio Reyes #767 1671	12-18-67	pet lar	1 yr
PD NY NY	Antonio Reyes #519805	9-3-68	165.25 PL A misd jostling 155.30 PL E fel GL pickpocket	
NYC Receipt Class Center East Elmhurst NY	Antonio Reyes #768 4064	9-12-68	pet lar	6 mos
PD NY NY	Antonio Reyes #519805	6-4-69	PL 155.30-3 GL 3	
NYC Receipt & Class Ctr East Elmhurst NY	Antonio Reyes #769 3407	6-9-69	att GL	8 mos
PD NY NY	Anthony Reyes #519 805	8-10-71	PL 140.20 burg PL 140.35 poss of burg tools	
PD NY NY	Antonio Reyes #519805	11-23-71	Grand Larc 155.30 Pl E Fel Crim Poss Stln Prop 165.40 Pl A Misd Unauth use of Motor Veh 165.05 PL A Misd	

Notations indicated by * are NOT based on fingerprints in FBI files but are listed only as investigative leads as being possibly identical with subject of this record.

FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

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RED, COMMUNICATE WITH AGENCY CONTRIBUTING THOSE FINGERPRINTS.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
PD NY NY	Antinlo Reyes 519805 SID 939319Y	4-4-73	PL 225.15 poss gamb rec	
PD NY NY	Antonio Reyes 519305 SID 939319Y	9-14-73	bail jumping	
Fed Det Hdqtrs NY NY	Antonio Reyes 79605 158	11-7-73	Viol Narc Laws SK Conhlin NYJTF/Agt	
DEA New York NY	Antonio Reyes CT-73-0151	11-7-73	Cr. Sales Dang Drug Heroin	
PD NY NY ✓	Antonio Reyes SID 939319Y	1-22-75	1. Burg 2 2. Grd Larc 3 3. Agg Harassment	

NAME Antonio Ruiz Epifanio Estrada OrtizB # 519 805ALIAS Antonio Reyes Rios, Antonio Reyes, Jose TorresE # 939319

This certifies that the finger impressions of the above named person have been compared and the following is a true copy of the records of this bureau.

D.C.I. # 475F.B.I. # 475

Date of Arrest	NAME	Borough or City	CHARGE	Arresting Officer	Date, Disposition Judge and Court
3/1/61	Antonio Ruiz	Bronx	Att. Pet. Larc.	Black 42 Sqd.	3/21/60 60 d S.S. Galloway, Sess.
X12/2/61	Antonio Reyes Rios	P.D. Puerto Rico	-	-	-
7/24/62	Jose L. Torres	Bronx	3305 PHL & 1747d PL	Coyle 41 Pct.	Spec. Sess. 8/14/ Doc. #3716 3305 8/24/62 Time Se Martinis.
4/6/63	Antonio Reyes	Bronx	722-6 PL	McKenna PP&C Sqd.	4/23/63 6 Mos. Bottiglieri-C
1/18/64	Antonio Reyes	Bronx	722-6 PL	O'Brien PP&C Sqd.	1/22/64 3 Mos. Breslin, Crim.
X2/17/64	Antonio Reyes	NYC	722-3 PL (Congregating)	D.J.	3 Mos.
8/23/65	Antonio Reyes	Bronx 2928-40	Gr. Larc.	Simone PP&C	9-29-65 Dismiss
*2-20-66	Antonio Reyes	Bronx	Pet Larc	Coyne 41 Sqd.	2-21-66 Cr Ct. Doc #1240 Art 3-4-66
3-11-66	Antonio Rios Reyes	Bronx 1004-41	Fugitive (Warrant)	Morgal 41 Sqd	
12-5-66	Epifanio E. Ortiz	Bronx 4881-41	Burglary	Hoffman 41st Pct	
8-10-67	Antonio Reyes	Bronx 2154-48	Gr Larc	Cole 48 Pct	

Record prepared on _____ Date _____

by _____ Signature _____ BCI

Rank _____ Shield No. _____ Command _____

X represents notations unsupported by finger prints in Bureau of Criminal Identification files.

15805

NAME AND ADDRESS GIVEN	BOROUGH OR CITY, ARREST NO./PCT.	CHARGE	ARRESTING OFFICER	DATE, DISPOSITION, JUDGE AND COURT
Antonio Reyes	Bronx 3336-42	165.25 PL Jostling 155.30 PL Gr. Larc.	Jennings PP&C	6-6-69- Dkt.#A5719 Final Chg: Att. Gr. Larc. 3rd - 8 mos. Jdg. Bloom
Antonio Reyes 961 Fox St. Bx.	Bronx 2795-42	155.30-E Gr. Larc.	Fitzsimmons 42 Pct.	6-6-69 8Mos NYC Recpt Center X/374
Anthony Reyes 3805 3 Ave.	Bronx 4291-48	PL 140.20 Burglary PL 140.35 Poss Burg. Tools	Milano 43 Pct.	
Antonio Reyes 3809 3 Ave	Bronx 6345-48	PL155.30-1 G/L/A-3 PL165.40 Poss Stln Prop-3 PL165.05-1 Unauth Use Mtr Veh	Schwab 48	
Antonio Reyes	Bronx 1756-48	225.15PL Poss Gamb Rec.	Williams 46 Pct.	
Antonio Reyes 1800 Monroe Ave	Bronx 26077-48	PL215.56-2 Mail Jumping	Williams 48 Pct.	
REYES, ANTONIO		US841(a) CSDD	FLANNERY NYDMEF/OCCE	
RD	CONTINUED ON PAGE			

X Indicates entries unsupported by fingerprints.

is or divulging such information for other than official use
of law and will be prosecuted accordingly.

The COMMANDING OFFICER, IDENTIFICATION SECTION, certifies
that the fingerprints of the above named person have been compared
and, UNLESS OTHERWISE SPECIFIED, the foregoing is a true copy of
the records of this section.

